Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

BELLSOUTH'S REPLY

BellSouth Telecommunications, Inc., by counsel, replies to the comments filed in response to the *Further Notice of Proposed Rulemaking*.[1]

Beneath the predictable rage of CLEC rhetoric, the fact remains that the Commission's current pick and choose rule has distorted what would otherwise be "normal" contract negotiations. Forbearance, or in the alternative, the availability of an "all or nothing" option instead of the current rule, will provide adequate CLEC protection, particularly in conjunction with existing statutory anti-discrimination and state commission review safeguards.

BellSouth has 496 operational interconnection agreements in place, of which 151 were "adopted" by CLECs under the current pick and choose rule. Of these 151 agreements, 36 were adopted in their entirety, and 115 were adopted with modifications. What these numbers tell us

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[1] *In the Matter of Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36, ¶¶ 713-29 (rel. Aug. 21, 2003) ("*NPRM*").

is that in nearly a third of all cases, BellSouth is not getting the opportunity to negotiate with CLECs because of the CLECs' ability to "opt in" to entire CLEC agreements. On the one hand, this suggests that forbearance from applying 252(i) is necessary because the current pick and choose rule (indeed, an all or nothing variant of that rule) "discourages the sort of give and take negotiations that Congress envisioned."[2] On the other, it suggests that since the majority of interconnecting carriers do negotiate their agreements with BellSouth, the company is not the monopolist bully characterized in CLEC pleadings.[3]

What these numbers do not explicitly show are the problems that arise when CLECs adopt provisions or even entire agreements without full awareness of the intent of the parties who drafted the original agreement, or where the "adopting" party's business plan or particular circumstances do not match those of the CLEC with whom BellSouth negotiated the original agreement. When this happens, and it has happened, problems may arise later when an "adopting" CLEC does not have the resources to implement or comply with an agreement negotiated by a competitor, and the interests of BellSouth's shareholders are harmed as a result.

These numbers also do not explicitly quantify the constraining effect that the pick and choose rule has on CLEC negotiations. Specifically, during CLEC negotiations, the existence of the pick and choose rule chills BellSouth's willingness to enter into custom provisions for fear that such provisions will be adopted by unrelated parties that are not in a position to deliver to BellSouth the benefit it is due from the bargain struck between the parties.

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2 *Id.*, ¶ 722.

3 These numbers demonstrate that, in over two-thirds of the cases, carriers either negotiate their own agreements or elect to adopt the standard interconnection agreement that BellSouth posts on its interconnection web site: www.interconnection.bellsouth.com.

The Commission has heard all of these arguments against the pick and choose rule before, and it has heard the economic generalities (monopolist bargaining strength, etc.) that supporters of the rule continue to advocate. About the only thing that has changed since the Commission initially adopted its rule is, in fact, the passage of time. This passage of time, however, is critical.

When the Supreme Court upheld the Commission's rule in the face of the ILECs' legal challenge (although the Supreme Court characterized the ILECs' position as "eminently fair"), the Court noted that "whether the Commission's approach will significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions) is a matter eminently within the expertise of the Commission and eminently beyond our ken."[4] The Commission now observes that, with the passage of time, and actual "experience since 1996, . . . the pick-and-choose rule discourages the sort of give and take negotiations that Congress envisioned."[5]

The Commission is not alone among regulators in this conclusion. The Florida Public Service Commission itself has expressed "misgivings" about the rule.[6] The Florida Commission observes that the current interpretation "significantly reduces competitors' incentives to negotiate," and can, over time "effectively defeat both the need and purpose of negotiation."[7] Indeed, the Florida Commission's observations tend to support BellSouth's own experience that the current rules constrain free and full negotiations. And in demonstration that the Florida

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4 *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999).

5 *NPRM*, ¶ 722.

6 Comments of the Florida Public Service Commission on Further Notice of Proposed Rulemaking at 3 (filed Oct. 15, 2003) ("FPSC Comments").

7 *Id.* at 3-4.

Commission is genuinely concerned with a market-based interpretation of the statute and with fair competition, that body has stressed the specific authority of the Act to require carriers to negotiate in good faith.[8]

Both the New York State Department of Public Service and the Public Utilities Commission of Ohio express similar concerns.[9] Based on its experience since 1996, New York DPS is able to state "applying an all-or-nothing rule to the terms of approved agreements should provide negotiating parties greater latitude to craft creative agreements that might expand the range of available services and options."[10] The PUC of Ohio observes that the current rule puts each of the companies entering into the original interconnection contract at a competitive disadvantage, and that, in light of this Commission's new UNE rules, the current pick and choose rules "may be outmoded or in some circumstances unworkable."[11]

The Supreme Court clearly signaled to this Commission that the Commission's particular approach under § 252(i) is eminently within the Commission's expertise. Proponents of the notion that the statute admits of no other interpretation than the current interpretation are simply mistaken. Time and experience, and the record in this proceeding, support a more nuanced and market-oriented approach to the Commission's rule.

Understandably, CLECs will howl at the notion of forbearance, but forbearance is appropriate in this case. To take BellSouth's example, the majority of contracts are already negotiated. Without pick and choose (or "all or nothing"), all contracts will be negotiated.

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8 *Id.* at 7.

9 Comments of the State of New York Department of Public Service at 2 (filed Oct. 16, 2003) ("New York DPS Comments"); Comments of the Public Utilities Commission of Ohio at 3 (filed Oct. 16, 2003) ("PUC of Ohio Comments").

10 New York DPS Comments at 2.

11 PUC of Ohio Comments at 3.

BellSouth will still make available a standard form interconnection agreement that carriers are free to execute as is, or to negotiate from as they desire, if they desire to minimize their transaction costs. And while they won't necessarily get the benefit of another competitor's unique bargain without negotiating for it, they will have all of the protections of state and federal oversight afforded under §§ 202, 208 and 251 of the Act.[12]

Forbearance also solves the (incorrect) legal argument that this Commission's hands are somehow tied, and that they are prohibited from interpreting a provision of the statute that the Supreme Court has said is "eminently within" its special expertise. Forbearance from the pick and choose rule is responsive to the concerns expressed by the Ohio, New York and Florida state commissions. In short, it is an approach that is worth trying.

As BellSouth explained in its comments, market conditions and statutory safeguards make an SGAT filing and approval requirement an unnecessary regulatory condition precedent to appropriate, market-driven regulatory oversight. Statutory good faith negotiation and non-discrimination obligations, together with current market conditions, justify a new approach that

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[12] LecStar complains about BellSouth's conduct in negotiations. There is an appropriate forum for legitimate complaints, and procedures to develop an accurate record concerning them, but unsupported statements in rulemaking comments are simply out of place. For the record, however, BellSouth agreed to LecStar's proposals in 17 out of the 27 requested modifications. Of the ten remaining issues, this Commission has no way of knowing the reasonableness or unreasonableness of either party's bargaining positions, but LecStar's positions were, in BellSouth's experience and business judgment, unreasonable. In any event, LecStar began by negotiating off of another carrier's agreement, and requested a "restart" due to an internal management change. BellSouth agreed, thus extending LecStar's time to negotiate. LecStar wound up adopting another carrier's nine-state agreement with a few mutually agreeable changes, including the right to adopt rates from another carrier's earlier agreement. All other provisions were mutually negotiated. This experience hardly constitutes grounds to maintain the current rule; indeed it demonstrates that where "pick and choose" is available, CLECs often insist on *further* negotiations to provisions or agreements that they have "picked" or "chosen," thus, rendering the rules essentially meaningless.

will "restore market-based incentives to negotiate" and "protect competitors from discrimination."[13]

The Commission's SGAT proposal has come under attack by CLECs in the comment round, although as several state commissions observe, the Commission's proposal (though not legally required) may be, in practical effect, a good "compromise."[14] With the new role of SGATs established as in the *NPRM*, these documents would have to be updated regularly and subject to regular state commission scrutiny. Therefore, their role in the interconnection context would change dramatically. However, the availability of an SGAT from which CLECs can pick and choose must not result in the availability of terms and conditions to which they are not entitled under § 252(i). An SGAT must contain "a statement of the terms and conditions that [a Bell operating company] generally offers within that State to comply with the requirements of section 251."[15] Section 252(i), by its express terms, and according to the Supreme Court, only applies to any "interconnection, service or network element" provided under an approved agreement.[16] Should the Commission choose to adopt its SGAT proposal, either as an interim step or in lieu of forbearance," the Commission should clarify that CLECs may not "pick and choose" from among the general terms in SGATs that are not "interconnection, service or network element terms."

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13 *NPRM*, ¶ 729.

14 *See, e.g.*, New York DPS Comments at 2.

15 47 U.S.C. § 252(f)(1).

16 47 U.S.C. § 252(i). *See Iowa Utils. Bd.*, 525 U.S. at 396.

CONCLUSION

CLEC attacks on the notion of forbearance and the reasonableness of the Commission's tentative conclusions are unwarranted. Forbearance remains the best means of restoring and achieving Congress's goal of meaningful marketplace negotiations. Because states retain oversight, and this Commission retains § 202 enforcement authority, forbearance or, in the alternative, a rule modification that does not discourage negotiation by allowing carriers to elect provisions that are independent of interconnection, service and network element terms, will restore market-based incentives to negotiate and allow competitors to remain protected from discrimination.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: /s/ Theodore R. Kingsley
Theodore R. Kingsley
Richard M. Sbaratta

Its Attorneys

Suite 4300
675 West Peachtree Street, N. E.
Atlanta, Georgia 30375
(404) 335-0720

Date: November 10, 2003

CERTIFICATE OF SERVICE

I do hereby certify that I have this 10th day of November 2003 served the parties to this action with a copy of the foregoing **REPLY COMMENTS OF BELLSOUTH** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

/s/ Juanita H. Lee
Juanita H. Lee

Service List CC Docket Nos. 01-338, 96-98 and 98-147

David Lynch
John Ridgway
Dennis Rosauer
Iowa Utilities Board
350 Maple Street
Des Moines, Iowa 50319

Cynthia B. Miller, Esquire
Office of Federal and Legislative Liaison
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Jonathan Askin
Association for Local
Tecommunications Services
888 17th Street, NW, Suite 1200
Washington, DC 20006

James M. Smith
Joint Commenters
Davis Wright Tremaine, LLP
1500 K Street, N.W.
Suite 450
Washington, DC 20005-1272

John F. Jones
Vice President
Federal Government Relations
CenturyTel, Inc.
100 Century Park Drive
Monroe, Louisiana 71203

Karen Brinkmann
Tonya Rutherford
CenturyTel, Inc.
Latham & Watkins LLP
Suite 1000
555 Eleventh Street, N. W.
Washington, DC 20004

Randolph L. Wu
Helen M. Mickiewicz
Ellen S. Levine
People of the State of California and
The California Public Utilities Commission
595 Van Ness Avenue
San Francisco, CA 94102

John J. Heitmann
Stephanie A. Joyce
CLEC Coalition
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

J. G. Harrington
Jason E. Eademacher
Cox Communications, Inc.
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washingotn, D.C. 20036

Michael E. Britt
Vice President, Regulatory Affairs
LecStar Telcom, Inc.
4501 Circle 75 Pkwy
Suite D-4200
Atlanta, Georgia 30339

Douglas G. Bonner
Noelle M. Kinsch
Mpower Communicaitons Corp.
LeBoeuf, Lamb,Greene & MacRae, L.L.P
1875 Washington Avenue, N. W.
Washington, D.C. 20009

Richard E. Heatter
Vice President Legal &
Regulator Affairs
Mpower Communications Corporation
175 Sully's Trail, Suite 300
Pittsford, New York 14534

David C. Bergmann, Esq.
Chair, NASUCA Telecommunications
Committee
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

Seema M. Singh, Esq.
Joshua H. Seidmann, Esq.
Ratepayer Advocate
New Jersey Division of the
Ratepayer Advocate
31 Clinton Street, 11th Floor
Newark, New Jersey 07101

NASUCA
8300 Colesville Road
Suite 101
Silver Spring, Maryland 20910

Dawn Jablonski Ryman
Kathleen H. Burgess
Public Service Commission of the
State of New York
Three Empire State Plaza
Albany, New York 12223-1350

Genevieve Morelli
Jennifer Kashatus
PACE Coalition and the Competitive
Telecommunications Association
Kelley Drye & Warren LLP
1200 19th Street, NW, Suite 500
Washington, D. C. 20036

JT Ambrosi
Vice President-Carrier &
Government Relations
PAETEC Communications, Inc.
1 PAETEC Plaza
600 Willowbrook Office Park
Fairport, New York 14450

Steven T. Nourse
Assistant Attorney General
Public Utilities Commisison
Of Ohio
Public Utilities Section
180 E. Broad Street, 7th Floor
Columbus, OH 43215

Sharon J. Devine
Michael B. Adams, Jr.
Qwest Communications International, Inc.
Suite 950
607 14th Street, N. W.
Washington, D.C. 20005

David Cosson
Clifford C. Rohde
Kraskin, Lesse & Cosson, LLC
2120 L Street, N. W., Suite 520
Washington, D.C. 20037

Terri L. Hoskins
Christopher Heimann
Gary L. Phillips
Paul K. Mancini
SBC Communications, Inc.
1401 I Street, NW, Suite 400
Washington, D. C. 20005

Norina Moy
Richard Juhnke
Sprint Corporation
401 9th Street, N.W. Suite 400
Washington, D.C. 20004

Richard M. Rindler
Michael W. Fleming
Commenters
Swindler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D. C. 20007

Indra Sehdev Chalk
Michael T. McMenamin
Robin E. Tuttle
United States Telecom Association
1401 H Street, N. W.
Suite 600
Washington, D. C. 20005-2164

John M. Goodman
The Verizon telephone companies
1515 North Courthouse Road
Arlington, VA 22201

John T. Scott, III
Charon H. Phillips
Elaine D. Critides
Verizon Wireless
1300 I Street, N. W.
Suite 400 West
Washington, D.C. 20005

Kimberly A. Scardino
Lisa R. Youngers
MCI
1133 19th Street, NW
Washington, DC 20036

Ruth Milkman
Renee Callahan
MCI
Lawler, Metzger & Milkman
2001 K Street, NW, Suite 802
Washington, D. C. 20006

Thomas M. Koutsky
Z-Tel Communications, Inc.
1200 19th Street, N. W., Suite 500
Washington, D.C. 20036

Christopher J. Wright
Timothy J. Simeone
Z-Tel Communications, Inc.
Harris, Wiltshire & Grannis, LLP
1200 Eighteenth Street, N. W.
Washington, D. C. 20036

Praveen Goyal
Senior Counsel for Government &
Regulatory Affairs
Covad Communications Company
600 14th Street, N. W., Suite 750
Washington, D. C. 20005

+Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
The Portals, 445 12th Street, S. W.
Room TW-A325
Washington, D. C. 29554

+Qualex International
The Portals, 445 12th Street, S. E.
Room CY-B402
Washington, D. C. 2-554

+ VIA ELECTRONIC FILING